

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Avenue TV Cable Service, Inc.)	CSR-6216-A
Petition for Special Relief)	
)	
)	
KVMD Licensee Co., LLC)	
Complaint for Carriage)	CSR-6202-M
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 10, 2003

Released: November 14, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KVMD Licensee Co., LLC (“KVMD” or “Station”), permittee of Station KVMD-DT, Twentynine Palms, California (Ch. 23-Ind.), has filed a Complaint against Avenue TV Cable Service, Inc. (“Avenue”) because of the cable operator’s refusal to carry the station’s digital television signal on its cable systems. Avenue filed an Opposition to the Complaint and KVMD filed a Reply.

2. Avenue filed a Petition, pursuant to Section 76.7 of the Commission’s rules and Section 614(h) of the Communications Act (“Act”),¹ seeking to exclude certain cable communities from KVMD’s market so that it would be under no obligation to carry the Station’s signal on its cable systems.² KVMD filed an Opposition to the Petition and Avenue filed a Reply. We jointly consider the Complaint and the Petition because they are interrelated.

II. BACKGROUND

3. Pursuant to Section 614 of the Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues* (“*Must Carry Order*”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.³ A station’s market

¹ 47 U.S.C. § 614(h)(1)(c).

² The cable communities at issue are Ventura and unincorporated Western Ventura County.

³ 8 FCC Rcd 2965, 2976-2977 (1993).

for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.⁴ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Each county in the United States is assigned to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁵

4. Under the Act, however, the Commission is directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

... with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station’s television market to better effectuate the purposes of this section.⁶

In considering such requests, the 1992 Cable Act provides that:

... the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁷

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the

⁴Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. 47 C.F.R. § 76.55(e); see *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) (“*Modification Final Report and Order*”).

⁵For a more complete description of how counties are allocated, see Nielsen Media Research’s *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁶47 U.S.C. § 534(h)(1)(C).

⁷*Id.*

[DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁸

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁹

5. In the *Market Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(A) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(B) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.¹⁰

(C) Available data on shopping and labor patterns in the local market.

(D) Television station programming information derived from station

⁸H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁹*Must Carry Order*, 8 FCC Rcd at 2977 n.139.

¹⁰The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

logs or the local edition of the television guide.

(E) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(F) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹¹

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be refiled at a later date with the appropriate filing fee. The *Market Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

6. In *Carriage of Digital Television Broadcast Signals* (“DTV Must Carry Report and Order”), the Commission concluded that under Section 614(a) of the Act, a digital-only television station has mandatory carriage rights, and amended the rules accordingly.¹² The Commission has established a framework for analyzing market modifications for digital television stations.¹³ The Commission stated that Nielsen’s market designations, publications, and assignments for the analog television market should continue to be binding on broadcast stations transitioning to digital television broadcasting. The presumption is that the market of the station’s digital signal is coterminous with the station’s market area for its analog signal during the transition period.¹⁴ The Commission also found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, will be applicable to digital television modification petitions during the transition period when television stations broadcast both an analog signal and a digital signal.¹⁵ The Commission recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of the analog television signal. Therefore, in deciding DTV market modification cases, the Commission stated that it would take into consideration changes in signal strength and technical coverage because of new digital television channel assignments and power limits. It concluded that all other matters concerning the modification process for digital television signals will be decided on a case-

¹¹47 C.F.R. § 76.59(b).

¹²See 16 FCC Rcd 2598, 2606 (2001); 47 C.F.R. § 76.64(f)(4). The Commission has held that a television station may elect to have its digital signal carried in an analog format by local cable systems. The Commission concluded that for purposes of supporting the conversion to digital signals and facilitating the return of the analog spectrum, a television station may demand that one of its high definition digital (“HDTV”) or standard definition digital (“SDTV”) television signals be carried on the cable system for delivery to subscribers in an analog format. *DTV Must Carry Report and Order*, 16 FCC Rcd at 2630.

¹³See *id.* at 2635-36.

¹⁴We note that in adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to insure that a station’s digital over-the-air coverage area would replicate as closely as possible its current over-the-air analog coverage area. See *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 (1997).

¹⁵See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

by-case basis.¹⁶

III. DISCUSSION

7. KVMD states that it is an authorized full service digital UHF station whose city of license is Twentynine Palms, California, a community located in San Bernadino County, California.¹⁷ KVMD further states that its DTV facility is authorized to broadcast on Channel 23 and commenced operations, pursuant to special temporary authority, on July 29, 2002. KVMD adds that on June 1, 2003, it discontinued analog operations, and commenced digital-only operations, pursuant to Commission authorization.¹⁸ KVMD states that the Station and Avenue's cable systems are both located in the Los Angeles DMA. KVMD states that by certified letters dated May 5, 2003, it elected and sought mandatory carriage on Avenue's cable system. On July 11, 2003, Avenue filed a Petition for Special Relief seeking modification of KVMD's market.¹⁹ Avenue's market modification arguments are set forth below.

8. **History of Carriage.** Avenue asserts that KVMD's digital signal has no history of carriage on its cable systems.²⁰ Avenue notes that KVMD's analog signal also did not have a history of carriage. Avenue also asserts that no cable system located in proximity to its system has carried, or is carrying, KVMD's analog or digital television signal. In its response, the Station asserts that Adelphia Communications and Charter Communications have "understandings" with KVMD to carry its signal on their respective cable systems in the Los Angeles DMA.²¹ According to KVMD, Adelphia and Charter serve communities close in geographic proximity to Avenue's cable system.²² Avenue argues that the fact that KVMD-TV, and now KVMD-DT, have never been carried on its system is entitled to evidentiary weight as a factor demonstrating a lack of nexus between the Station and Ventura.²³ Avenue states that KVMD-DT's addition to Adelphia's channel line-up is a new development and is outweighed by its much longer history of non-carriage. Avenue argues that the letter from the Station to Adelphia, which is included as an exhibit in KVMD's opposition, does not supply any context or circumstances under which Adelphia has agreed to carry the station.²⁴ Avenue concludes that KVMD-DT has not demonstrated a nexus between the station and Ventura.

9. **Local Service.** Avenue asserts that KVMD fails to provide any coverage or local service to the Avenue communities.²⁵ Avenue provides evidence showing that Twentynine Palms is 185 air miles

¹⁶ *Id.*

¹⁷ Twentynine Palms is on the eastern edge of the Los Angeles DMA.

¹⁸ KVMD Must Carry Complaint at 2, citing *KVMD(TV), Twentynine Palms, CA*, DA 03-1481 (rel. May 1, 2003).

¹⁹ In Avenue's Opposition to KVMD's must carry complaint, the operator argues that the complaint was prematurely filed. Avenue also requests that the complaint should be consolidated with its market modification petition. As we grant Avenue's request and its petition, we need not address whether KVMD's complaint was procedurally defective.

²⁰ Petition at 7.

²¹ Opposition to Petition for Special Relief at 6.

²² KVMD asserts that Adelphia currently carries the Station on nine of its systems, including its system serving parts of Ventura County. *Id.* at n.7 and Exhibit B.

²³ Reply at 5.

²⁴ *Id.* at 6.

²⁵ Petition at 3.

from the Ventura cable headend and the Station's transmitter, located in Joshua Tree, is 171 air miles from the Ventura headend.²⁶ Avenue asserts that the San Gabriel mountains lie directly between Ventura and Twentynine Palms. Avenue states that it would take approximately 4 hours to drive from Ventura to Twentynine Palms. Avenue concludes that because of the distances, the mountains, and the travel time, it is unlikely that residents in one community would routinely shop or work in the other. Avenue also asserts, based on engineering studies it has conducted, that KVMD does not provide noise free 41 dBu contour coverage to Ventura.²⁷

10. In response, KVMD concedes that the Station fails to place a digital service contour over the cable communities and that the Station is approximately 185 miles from Ventura.²⁸ KVMD states, however, that its commitment to deliver its signal to Avenue via satellite ensures delivery of a good quality signal to the cable headend, regardless of signal strength and/or distance issues.²⁹ KVMD urges the Commission to replace contour and distance standards with a good quality signal rule. According to KVMD, if a digital station is able to deliver a good quality signal to the cable operator's headend by any means, it should qualify for carriage.³⁰ KVMD adds that analog-based contour and distance concepts are poorly suited to the propagation of digital signals which are subject to the "cliff effect."³¹ Avenue does not dispute the ability of a station under current Commission policy to perfect its must carry rights by delivery of a good quality signal through alternative means. Avenue asserts that the question here is not whether KVMD may perfect its mandatory carriage rights, but whether the station ought to be possessed of those rights as to Ventura in the first instance.³²

11. Avenue asserts that KVMD does not provide any programming with a local nexus to Ventura; instead, the Station provides primarily paid programming, none of it related specifically to Ventura.³³ KVMD counters that its programming has a "distinct nexus" to the cable communities at issue. It asserts that it carries a substantial amount of programming about horses and that there are many horse enthusiasts throughout the Los Angeles DMA.³⁴ KVMD also states that it carries informational and "inspirational" local programming such as "Working Wardrobe" for area viewers.³⁵ KVMD adds that it expects to launch a new locally produced news program directed at viewers in San Bernadino, Riverside, Orange, and Los Angeles Counties. Avenue asserts that KVMD has not provided sufficient evidence in

²⁶ *Id.* at 4.

²⁷ *Id.* and Exhibit A. Avenue also states that it cannot receive a good quality signal from the station because: (1) the Station's transmitter is far away from the cable headend and (2) the signal was masked by KTLA's digital transmission from Mount Wilson. See Petition at Exhibit C.

²⁸ Opposition to Petition for Special Relief at 7.

²⁹ *Id.*

³⁰ *Id.* at 9.

³¹ *Id.* at 11. The Commission has explained the cliff effect in its *DTV Must Carry Report and Order*. If a digital signal is received, a good quality picture can be constructed at the television receiver; however, once the signal falls below a minimum signal threshold, no picture can be reconstructed or displayed by the television receiver. See 16 FCC Red at 2617 n.131.

³² Reply at 7.

³³ Petition at 6.

³⁴ Opposition to Petition for Special Relief at 10.

³⁵ *Id.* at 11.

the record to support its claim that the Station's programming serves the interests of viewers in the cable communities.³⁶ Avenue argues that the Station's absence from the television schedule found in the local Ventura newspaper, as well as the local edition of the TV Guide, demonstrates a lack of nexus between KVMD and the cable communities.³⁷

12. **Carriage of other local television stations.** Avenue asserts that it carries 16 Los Angeles television stations that cover news, sporting events, and issues of concern to the cable communities.³⁸ Avenue asserts that these stations have a closer nexus to Ventura because they are more proximate and because they provide a Grade B signal as well as local programming to Ventura.³⁹ Avenue adds that it provides local programs on a public, educational and governmental access channel for its Ventura subscribers. KVMD argues that Avenue has made no showing that it currently carries any broadcast television station that offers the unique programming it provides or that promises to deliver the local news and community interest stories that it plans to offer in the future.⁴⁰

13. **Viewing patterns.** Avenue asserts that KVMD has no measurable viewership in the Ventura area.⁴¹ KVMD argues that it should be treated as a new station for market modification purposes because it is under new ownership and because it is a new digital-only station.⁴² Based on these facts, KVMD states that viewership levels should not be accorded substantial weight in this proceeding. Avenue argues that the Station's claim to new station status is illusory given that it operated for nearly six years as an analog television station; as such, its claim that it has not had the time necessary to build viewership should be rejected.⁴³

14. **Other factors.** KVMD argues that full market cable carriage of digital stations is necessary to spur consumer interest and participation in the digital television transition.⁴⁴ Avenue, in its Reply, argues that this proceeding is not the place to consider KVMD's arguments about digital television transition policy.⁴⁵ Avenue argues that the Commission's task here is simply to apply the specific statutory factors it has already found to be applicable to market modification petitions in connection with this particular petition.

15. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market.⁴⁶ Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for

³⁶ Reply at 7-9.

³⁷ *Id.*

³⁸ Petition at 7.

³⁹ *Id.* at 8.

⁴⁰ Opposition to Petition for Special Relief at 13.

⁴¹ *Id.*

⁴² Opposition to Petition for Special Relief at 14.

⁴³ Reply at 12.

⁴⁴ Opposition to Petition for Special Relief at 20.

⁴⁵ Reply at 2.

⁴⁶ 47 U.S.C. § 534(h)(1)(C).

market modification, to afford particular attention to the value of localism by taking such matters into account.⁴⁷ These principles apply to all television stations without regard to the mode in which the station broadcasts. KVMD urges us to adopt a new paradigm for market modification cases involving digital television stations. It asks us to abandon precedent and order a cable operator to carry a digital television signal if a subject television station promises to provide a good quality signal to the cable system's principal headend. KVMD's proposal is directly contrary to Section 614(h). As Avenue argues, the broadcast signal carriage rules were not intended to transform a station, either analog or digital, with a restricted service area into a regional superstation that must be carried in every single community in a DMA; if this were the case, then Congress would not have explicitly permitted cable operators to file market modification petitions under Section 614(h) of the Act.⁴⁸

16. Furthermore, the Commission has found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, are applicable to digital television modification proceedings during the transition period.⁴⁹ KVMD's proposal ignores the directives the Commission established over two years ago. KVMD did not petition the Commission to reconsider its conclusions on the application of Section 614(h) to digital television stations. It is inappropriate for KVMD to attempt to do so here, or in other market modification proceedings.

17. Avenue has presented evidence in the record to support its request. In this matter, KVMD has no history of carriage and no discernable viewership in the communities at issue. The record evidence also indicates that KVMD's analog signal, when it was broadcasting, was not carried and did not have viewership in the cable communities. Adelphia does carry KVMD in systems near Avenue's system. However, the Station has been carried for only a short period of time and the circumstances under which Adelphia agreed to carry KVMD are unknown. Moreover, although KVMD claims to have carriage "understandings" in place with Charter, this operator is not carrying the station's signal and there is no clear indication in the record as to when, where, or under which circumstances such carriage would commence. In any event, while carriage by a neighboring cable operator may be a relevant consideration in certain market modification cases, such evidence is clearly overwhelmed by the Station's lack of a local connection with the cable communities at issue here.

18. With regard to the second statutory factor, we find that KVMD is geographically distant from the communities, its digital coverage area falls short of the cable communities, and the Station is separated from the communities by mountain ranges, desert areas, and political boundaries. KVMD has also failed to rebut Avenue's showing with sufficient evidence that its programming has a distinct nexus to the cable communities. Moreover, although the Station has indicated that it plans to provide locally oriented programming in the future, we cannot base our decision on future programming predictions. Avenue has shown, however, that there are numerous local television stations that it currently carries that provide specific programming of interest to the cable communities.⁵⁰ In conclusion, relying on case precedent for analog television station market modifications, the grant of Avenue's market modification request would effectuate the purposes of Section 614(h) of the Act. Because we find that KVMD is not local for mandatory carriage purposes, its must carry complaint is dismissed as moot.

⁴⁷ 47 U.S.C. § 534(h)(1)(C)(i).

⁴⁸ Reply at 4.

⁴⁹ See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636.

⁵⁰ See Petition at 14.

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that the must carry complaint filed by KVMD Licensee Co., LLC against Avenue TV Cable Service, Inc. **IS DISMISSED**.

20. **IT IS FURTHER ORDERED** that the petition for special relief to modify the television market of Station KVMD-DT filed by Avenue TV Cable Service, Inc. **IS GRANTED**.

21. These actions are taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵¹

FEDERAL COMMUNICATIONS COMMISSION

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⁵¹ 47 C.F.R. § 0.283.